successful,"[124] the Commission should not set a low threshold showing which would only allow complainants to harass their competitors and would harm consumers by discouraging price cutting.

The Commission must also ensure that no challenges can be made to rate discounts put into effect prior to February 8, 1996, the effective date of the 1996 Act. Time Warner established its MDU rates based on the regulations promulgated pursuant to the 1992 Cable Act, and those established rates should not now be made subject to new provisions.[125] Moreover, "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[126] The language of Section 301(b)(2) of the 1996 Act does not require retroactive application of rules implemented pursuant thereto.

Finally, Time Warner generally supports the Commission's adoption of the discovery procedures set forth in the rules for the adjudication of program access complaints[127] in the context of predatory pricing complaints. However, Time Warner asks the Commission to adopt a rule providing for the confidential treatment of a cable operator's cost information where submission of such information is required upon a finding that a *prima facie* showing

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[124] Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

[125] See Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (when parties have relied on a lawful regulation and planned their activities accordingly, retroactive modification of the regulation can cause "great mischief," which must be balanced against any salutary effects of retroactivity); United States v. Exxon Corp., 561 F. Supp. 816, 836 (D.D.C. 1983) ("Among the factors weighing in the balance are the extent to which a party has relied on previously settled law and the burden which the retroactive rule would impose on a party."), aff'd, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986).

[126] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

[127] See 47 C.F.R. §§ 76.1003(g), (j).

of predatory pricing has been met. Because cost information is commercially sensitive, it should not be required to be made available to the public or to competitors. Time Warner also specifically proposes that the Commission adopt a rule permitting the levy of sanctions for the filing of frivolous predatory pricing complaints.[128/]

V. SMALL CABLE OPERATORS

Section 301(c) of the 1996 Act amends Section 623 of the Communications Act, relating to cable rate regulation, to exempt smaller cable systems from certain rate regulation provisions. Specifically, Section 301(c) adds the following subsection (m) to Section 623 of the Communications Act:

> (m) Special Rules for Small Companies. --
>
> (1) In General. -- Subsections (a), (b), and (c) do not apply to a small cable operator with respect to--
>
> (A) cable programming services, or
>
> (B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.
>
> (2) Definition of Small Cable Operator. -- For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

[128/] See id. at § 76.1003(q) (frivolous program access complaints subject to appropriate sanctions).

In the Cable Reform NPRM, the Commission adopts certain interim rules to implement this new subsection of Section 623 of the Communications Act, and requests comment regarding the adoption of final rules to implement this provision.

A. Small System Deregulation Survives the Subsequent Growth of a Small Cable Operator or the Acquisition of a Small Cable Operator by a Large Company.

Time Warner urges that eligibility for small system relief under the 1996 Act should be assessed on a "snapshot" basis as of February 8, 1996. Thus, any cable operator that can establish that the affected cable system met the statutory subscriber and revenue thresholds contained in Section 301(c) as of the effective date of the 1996 Act should not be subject to reregulation upon subsequently exceeding those statutory thresholds. As the Commission has already recognized, "the small cable operator provisions of the 1996 Act . . . have the . . . intent of minimizing regulation and ensuring access to needed capital for smaller cable entities."[129/] Such provisions should be viewed as an acceleration of the March 31, 1999 sunset of upper tier rate regulation provided generally for all cable operators in Section 301(b)(1)(C) of the 1996 Act. Such an acceleration of CPST rate deregulation for the benefit of small cable operators furthers the goal of loosening the regulatory constraints on such operators so they can devote their resources to effectively serving their subscribers and to corporate growth initiatives.

To penalize small cable operators for meeting such goals by subjecting them to reregulation would subvert the intent underlying the statutory relief provided for such operators. The Commission recognizes as much when it notes that "[t]he addition of subscribers by a system or operator would seem to indicate that the company is responding to

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[129/]Cable Reform NPRM at ¶ 26.

consumer demand. We would not want to discourage such responsiveness on the part of cable operators."[130/] Further, such reregulation would result in needless confusion. Complete CPST rate deregulation is scheduled to occur in less than 3 years. It would constitute an unjustifiable hardship to subject a small cable operator who previously qualified for deregulation to the burdens of reregulation when CPST rate deregulation could be as little as a few months away. Such a result would be contrary to the thrust of the 1996 Act, which is to limit undue regulation.

Additionally, the imposition of the administrative burden of reregulation upon such small cable operators would be inconsistent with the treatment currently afforded small cable operators under the Commission's existing streamlined cost-of-service rules. Those existing rules are applicable to any cable system serving fewer than 15,000 subscribers, as long as the system is not owned by a cable operator serving more than 400,000 subscribers. Once a small system qualifies for the existing streamlined methodology, that system remains eligible as long as it serves 15,000 or fewer subscribers even if it is subsequently acquired by a company that exceeds the 400,000 subscriber limit.[131/] Obviously, the imposition of reregulation upon a small cable operator which had qualified previously for deregulation under the 1996 Act and subsequently fails to meet the statutory subscriber and revenue criteria as a direct result of acquisition by a larger company would be inconsistent with the existing streamlined rate relief for small cable operators. Such an inconsistency would not be a rational result.

[130/]Id. at ¶ 93.

[131/]See Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket Nos. 92-266 & 93-215, 10 FCC Rcd 7393 (1995) at ¶ 73.

B. At a Minimum, If Small Cable Operators are to be Subject to Reregulation Upon Acquisition by a Large Company, the Allowable Small System Rate in Effect Upon Acquisition Should Be Grandfathered.

In any event, should the Commission decide to ignore the inconsistency outlined above and impose reregulation upon small cable operators after their acquisition by a larger company, at a minimum, the allowable small system rate in effect upon acquisition by the larger operator should be grandfathered (i.e., not subject to rate rollbacks). Any future rate increases would be governed by the price cap methodology applicable to the acquiring company. This approach would be most consistent with existing Commission policy in the small system streamlined cost-of-service area,[132/] and indeed, the Commission has recognized that this approach could apply to the small cable operator provisions in the 1996 Act.[133/] The Commission should not subject small cable operators to reregulation upon the occurrence of any subsequent events which would no longer satisfy the eligibility criteria, but in the event it does, the approach outlined above would be most equitable.

VI. TECHNICAL STANDARDS

The 1996 Act amended Section 624(e) of the Communications Act to limit the ability of local franchising authorities to regulate in the areas of technical standards, scrambling and other signal transmission technologies, and the subscriber equipment utilized by cable operators. Prior to passage of the 1996 Act, Section 624(e) provided:

> Within one year after the date of enactment of the Cable Television Consumer Protection and Competition Act of 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. A

[132/] Id.

[133/] Cable Reform NPRM at ¶ 94.

> franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of the standards prescribed under this subsection. A franchising authority may apply to the Commission for a waiver to impose standards that are more stringent than the standards prescribed by the Commission under this subsection.[134/]

Section 301(e) of the 1996 Act amended Section 624 by deleting the last two sentences (highlighted above) and adding in their place the following:

> No State or franchising authority may prohibit, condition or restrict a cable system's use of any type of subscriber equipment or any transmission technology.[135/]

The legislative history accompanying passage of the 1996 Act evidences the unambiguous intent of Congress to preclude local regulatory involvement in the areas of technical standards, customer equipment and transmission technologies as a matter of national communications policy. The legislative history accompanying the House version of the telecommunications legislation, which contained what is now Section 301(e) of the 1996 Act, states:

> Subsection (j) [now section 301(e)] amends section 624(e) of the Communications Act by prohibiting States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies. The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee finds that the patchwork of regulations that would result from a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.[136/]

[134/]47 U.S.C. § 544(e) (emphases added).

[135/]1996 Act at Sec. 301(e), to be codified at Communications Act, § 624(e).

[136/]H.R. Rep. No. 204, 104th Cong., 1st Sess. 110 (1995).

The amendments to the Communications Act embodied in Section 301(e) of the 1996 Act limit the authority of local franchising authorities over technical standards and related issues in three specific ways. First, LFAs may no longer require, as part of the grant, modification, renewal or transfer of any franchise, provisions that allow them to enforce any technical standards applicable to cable television systems that are adopted by the FCC. Second, LFAs may no longer request that the Commission allow them to impose or enforce technical standards that are more stringent than the FCC's standards. Third, no State or LFA may interfere with a cable operator's right to deploy any subscriber equipment or transmission technology that it deems appropriate, including scrambling or other forms of encryption.

In its Cable Reform NPRM, the Commission has implemented only two of these three express amendments. Specifically, the Commission has eliminated Note 6 to Section 76.605 of its rules, which permitted a franchising authority to apply to the FCC for a waiver to impose technical standards that are more stringent than the standards prescribed by the Commission. The Commission has also inserted the new language that was added to Section 624(e) prohibiting States and LFAs from interfering with the subscriber equipment or transmission technology decisions made by the cable operator.[137/] The Commission has failed, however, to implement the third specific change mandated by Congress which eliminates day-to-day LFA oversight and enforcement of technical standards compliance issues as part of any franchise, modification, renewal or transfer.

Because the Commission has in the past allowed LFAs in the first instance to engage in the day-to-day oversight and enforcement of the Commission's technical standards, the

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[137/]Cable Reform NPRM at ¶ 42.

Commission has sought comment on the overall scope and meaning of new Section 624(e) of the Communications Act. Specifically, the Commission notes that Congress did not amend Sections 626 or 621 of the Communications Act, which allow LFAs to consider signal quality and an operator's technical qualifications in awarding or renewing a franchise to provide cable service.[138/] Implicit in this observation is that Congress may not have intended to entirely preclude local regulation and enforcement of technical standards.

Congress could not have been more clear in its purpose in adopting its amendments to Section 624(e) of the Communications Act. The statutory changes to Section 624 and the legislative history explaining those changes leave no doubt that Congress intended to entirely preclude LFA involvement in the establishment or day-to-day enforcement of technical standards applicable to cable television systems. The FCC is simply not free to ignore the fact that Congress specifically deleted the sentence in former Section 623(e) which expressly allowed local franchising authorities to enforce the standards adopted by the FCC. Had Congress desired to allow local franchising authorities to continue to enforce FCC mandated technical standards, it would not have deleted the language in Section 624(e) which expressly granted LFAs such enforcement powers.

The Commission has requested comment on how Congress' amendment to Section 624(e) affects the local franchising authority's power to take into consideration technical standards issues in granting a franchise pursuant to Section 621 of the Communications Act and in granting a renewal franchise pursuant to Section 626 of the Communications Act.[139/] The simple answer is that, while local franchising authorities are no longer free to establish

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[138/] Id. at ¶ 104.

[139/] Id.

their own technical standards or to enforce the FCC's technical standards on a day-to-day basis, they may take the operator's compliance with FCC standards into account in granting an initial or renewal franchise.[140/]

As the Cable Reform NPRM notes, Section 621 of the Communications Act provides that a franchising authority "may require adequate assurance that the cable operator has the . . . technical . . . qualifications to provide cable service "[141/] This language speaks only to the relevant lines of inquiry which a franchising authority can undertake in deciding whether or to whom a franchise should be awarded. Thus, pursuant to Section 621, a local franchising authority might properly seek information which would allow the cable operator to demonstrate that it has the technical qualifications to construct and operate the type of cable system for which it seeks to obtain a franchise, such as to the number of systems which it operates, how long it has operated these systems, the channel capacity and services offered by those systems, whether the applicant initially designed and constructed the systems, and the qualifications of the cable operator's engineering and other management staff. Nothing in Section 621 suggests that a franchising authority is empowered to adopt or enforce technical standards as part of its local regulatory authority to award cable franchises. Indeed, the amendments to Section 624(e) make clear that a local franchising authority may no longer do so.

Similarly, nothing in Section 626, governing franchise renewals, gives the LFAs the authority to adopt their own technical standards or enforce existing FCC technical standards

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[140/]In a similar manner, § 626(c)(1)(A) of the Communications Act allows LFAs to consider compliance with applicable laws in deciding whether to renew a cable operator's franchise even though applicable law may not necessarily give rise to any enforcement authority on the part of an LFA directly.

[141/]Cable Reform NPRM at ¶ 104, citing Communications Act, § 621(a)(4)(C).

as part of their local franchise responsibilities. Section 626 merely allows a LFA to consider the adequacy of the cable operator's signal quality as one of several factors in determining whether the operator's past service has been adequate to meet community needs. To this end, during the renewal process, a local franchising authority may take into account any determinations that have been made regarding whether or not the cable operator has complied with FCC technical standards in judging the adequacy of the cable operator's services. In the past, those determinations may have been made by either the FCC or by the LFA under Section 624(e). As a result of the amendments made by the 1996 Act, such determinations now must be made by the FCC alone. In cases where there is a dispute as to signal quality or whether a cable operator is operating in compliance with the FCC's technical standards, the local franchising authority remains free to petition the FCC for a determination of compliance and any enforcement action that may be warranted under the circumstances and to consider the FCC's determination as one of many factors upon which the operator's franchise renewal application is assessed.

Finally, the Commission itself notes that the ability of a local franchising authority to specify criteria, such as a system upgrade, upon which a renewal proposal will be based is expressly made "subject to Section 624" of the Communications Act.[142/] This language encompasses the limitations added to Section 624(e) precluding local franchising authorities from adopting or engaging in the day-to-day enforcement of technical standards, transmission technologies or subscriber equipment. There simply was no need for Congress to make any separate amendment to the existing language of Section 626 in order to implement the

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[142/]Cable Reform NPRM at ¶ 104, citing Communications Act, § 626(b)(2).

changes made in Section 624(e), since Section 626, by its own express terms, is subject to all limitations contained in Section 624.

VII. ADVANCED TELECOMMUNICATIONS INCENTIVES

As the Commission recognized in the Cable Reform NPRM, in adopting the 1996 Act, Congress clearly intended to promote the development of advanced interactive broadband telecommunications networks and services. The Commission should take immediate action to implement this intent. Time Warner believes that the best way for the Commission to implement Congress' intent is simply to create incentives for new broadband entrants to deploy their own advanced networks, while at the same time creating incentives for incumbent providers to upgrade their networks to provide these new interactive services. Accordingly, Time Warner believes the Commission should require new broadband providers to install and upgrade their own broadband distribution facilities wherever possible rather than merely "piggy-backing" on the existing facilities of incumbent providers.

An overview of the 1996 Act and its legislative history illustrates Congress' express intent to create such incentives for telecommunications providers of all types to deploy competing state of the art broadband interactive communications networks. On the very first page of the conference report introducing the final version of the bill to Congress, the conference committee stated:

> The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . .[143]

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[143]Conference Report at 113 (emphasis added)

This passage demonstrates that Congress' whole point in establishing a policy of promoting competition is that competition in turn promotes the development of advanced yet affordable new services and facilities to the direct benefit of consumers. It is the ability to access and choose from a diverse selection of competing providers. services, and networks that best ensures that the American public receives the advanced telecommunications capability that Congress envisioned.

As the Commission recognizes, this intention is reflected in the Act itself. In Section 706, the Congress directs the Commission and the States to actively develop policies that give telecommunications providers incentives to build and upgrade advanced networks:

> (a) The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[144/]

Under Section 706(b), the Commission is required to undertake a regular inquiry to evaluate the extent to which advanced networks are being deployed, and if it finds that either they are not or deployment is lagging, the Commission is required to immediately take action:

> (b). . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.[145/]

[144/] 1996 Act at Sec. 706(a).

[145/] Id. at Sec. 706(b).

Congress could not have been more clear about what it intended -- an overriding goal of the 1996 Act is to create incentives for providers of all types to deploy their own advanced broadband communications networks and facilities

However, this intention was not to be restricted to existing broadband providers such as incumbent cable operators Congress expected that the 1996 Act would promote the deployment of overlapping advanced communications networks by, for example, encouraging telephone companies to further build and develop their own advanced broadband networks. As noted by the House Report:

> Telephone company entry into the delivery of video services will encourage telephone companies to modernize their communications infrastructure. Specifically, the deployment of broadband networks would be accelerated if telephone companies were permitted to offer video programming. These networks would be capable of transmitting voice, data, and video to consumers. Without this incentive, telephone companies will build advanced networks more slowly. Moreover, telephone company entry into cable would encourage technological innovation.[146/]

Certainly, this rationale applies to other competing communications providers as well, including SMATV, DBS, and MMDS providers. They too must be encouraged to develop and offer advanced communications networks Accordingly, in order to best implement Congress' intent, the Commission's rules must create incentives for each of these providers to build and upgrade their own distribution systems in order to provide for advanced network capabilities. The most effective way to achieve this result is to quickly deregulate all sectors of the telecommunications industry to the maximum extent authorized by the 1996 Act, consistent with the underlying Congressional goals

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[146/]H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 53 (1995).

Cable operators such as Time Warner have demonstrated a commitment to providing advanced communications capabilities over their networks. In fact, cable operators have over the past several years been engaging in expensive upgrades of their distribution networks in order to provide their customers with a vast array of advanced services in addition to multichannel video programming. Cable system upgrades accomplish exactly the advanced network capabilities that Congress intended to promote. The Commission must not undertake any policy that discourages cable operators from further upgrading their broadband distribution facilities to include advanced network capabilities.

For example, Time Warner itself has invested over $150 million in Manhattan alone to upgrade its broadband delivery infrastructure inside MDU buildings. It is precisely the nature and extent of this investment, combined with the tremendous service options such upgrades will provide to subscribers, that Time Warner considers the MDU demarcation point issue so crucial to its desire to deliver advanced interactive broadband services to all its customers. If the point of demarcation is altered in CS Docket No. 95-184 so as to preclude cable operators from continued use of a crucial portion of their MDU distribution infrastructure, their ability to offer voice telephony, data service and Internet access, as well as to raise significant capital necessary to compete with incumbent local exchange carriers, will be greatly impaired to the detriment of MDU residents. Moving the broadband demarcation point or mandating access to internal wiring for the benefit of competing MVPDs, would, therefore, run contrary to Congress' express direction to the Commission to adopt rules that promote incentives for the development of advanced communications facilities. If building owners or competing providers are given the right or ability to

expropriate cable operator MDU wiring, cable operators' incentives to upgrade their facilities will be extinguished. Cable operators simply cannot reasonably be expected to further invest in advanced networks if the ultimate effect of such investment will be to provide a massive subsidy to their competitors.

Congress, in implementing the 1996 Act, clearly intended to promote, not destroy, such investment in advanced telecommunications facilities and infrastructure development. The Commission's policies, consistent with Congressional will that advanced telecommunication networks be promoted and be widely available, must not in any way discourage the implementation of network upgrades and deployment of advanced technology. Congress recognized the value of insuring that advanced network capabilities are accessible to every consumer, whether they are rich or poor, urban or rural, or live in a single family home or in a large apartment building. Time Warner believes that this policy should apply no less in MDUs than in any other context.

VIII. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMMING

Sec. 506 of the 1996 Act codifies the discretion of cable operators, at their election, to refuse to transmit programming on public or leased access channels "which contains obscenity, indecency or nudity."[148/] While this provision is certainly a step in the right direction, Time Warner continues to challenge all public, educational, governmental or leased access requirements as an unconstitutional interference with a cable operator's editorial discretion as guaranteed by the First Amendment. Thus, while the Commission's

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[148/] 1996 Cable Act at Sec. 506.

proposed definition of "nudity,"[149] as used in Sections 506(a) and (b) of the 1996 Act, appears reasonable, Time Warner believes that cable operators should have unfettered discretion to refuse to carry any programming they find to be objectionable or otherwise inconsistent with their assessment of local subscriber tastes.[150] At a very minimum, the Commission should further clarify that when a cable operator refuses to carry public or leased access programming which is reasonably believed to contain obscenity, indecency or nudity, such judgments are presumptively valid and not subject to collateral attack. Cable operators should not be exposed to the possibility of harassing lawsuits from programmers who have been turned down because the cable operator has made a good faith determination that the program contains obscene or indecent material.

CONCLUSION

Time Warner urges the Commission to implement the cable reform provisions of the 1996 Act expeditiously and in accordance with the principles described above so that Time Warner and other cable operators will be better able to respond to the increasing competitive

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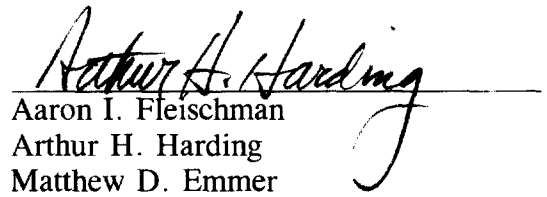
[149] See Cable Reform NPRM at ¶ 111. Under that test, consistent with the Supreme Court's ruling Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2278 (1995), only sexually explicit nudity which is obscene or indecent would be encompassed.

[150] 422 U.S. 205, 95 S.Ct. 2278 (1975).

onslaught while at the same time upgrading their facilities to provide competition in other sectors of the telecommunications arena.

Respectfully submitted,

TIME WARNER CABLE



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